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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

JERRY WAYNE DUNN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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40 pp

QUESTION PRESENTED

Whether the Sentencing Commission's implementation of the Career Offender Guideline conflicts with the Commission's obligation under 28 U.S.C. 994(h) to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of" career offenders.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals addressing the government's cross-appeal of respondent's sentence (App., *infra*, 1a-7a) is reported at 80 F.3d 402. The opinion of the court of appeals affirming respondent's convictions and sentence (App., *infra*, 8a-15a) is unpublished, but the judgment is noted at 82 F.3d 424 (Table). The order of the district court (App., *infra*, 16a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1996. A petition for rehearing was denied on July 11, 1996. App., *infra*, 23a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION AND SENTENCING GUIDELINE INVOLVED

The following provisions are set forth in an appendix to this petition: 28 U.S.C. 994(h), and Sentencing Guidelines § 4B1.1 (Nov. 1, 1995), with accompanying Commentary.

STATEMENT

After a plea of guilty in the United States District Court for the Eastern District of Washington, respondent was convicted of possession of methamphetamine within 1000 feet of a public school with the intent to distribute it, in violation of 18 U.S.C. 841(a)(1) and 860(a). After a jury trial in a related case, respondent was also convicted on one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1), and one count of possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k). Respondent was sentenced to concurrent terms of 120 months' imprisonment on the Section 922(g)(1) conviction, 60 months' imprisonment on the Section 922(k) conviction, and 188 months' imprisonment on the methamphetamine conviction. Respondent appealed his convictions and sentence. The United States cross-appealed respondent's sentence on the methamphetamine conviction. The court of appeals affirmed. App., *infra*, 1a-7a, 8a-15a.

1. In 1984, Congress created the United States Sentencing Commission and charged it with the responsibility to promulgate sentencing guidelines for the federal system. See 28 U.S.C. 991; *Mistretta* v. *United States*, 488 U.S. 361, 366 (1989). In addition to articulating general goals for federal sentencing that the Commission was directed to meet, see *Neal* v. *United States*, 116 S. Ct. 763, 767 (1996), Congress gave the Commission a variety of specific requirements with which it was to comply. 28 U.S.C. 994(b) to (n). Among those requirements is the following provision, dealing with career offenders convicted of crimes of violence or drug trafficking crimes:

> The [Sentencing] Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and [(1) has been convicted of a felony that is a crime of violence or a drug trafficking crime, and (2) has two prior felony convictions involving crimes of violence or drug trafficking crimes].

28 U.S.C. 994(h).

The Sentencing Commission implemented Section 994(h) in Section 4B1.1 of the Sentencing Guidelines, entitled "Career Offender," which provides as follows:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career

criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum	Offense Level*
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12.

* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

Before November 1, 1994, the commentary to that Guideline defined the phrase "offense statutory maximum" to mean "the maximum term of imprisonment authorized for the offense of conviction." Neither the Guideline itself nor any accompanying commentary specified the manner in which the "offense statutory maximum" was to be determined when federal law specified a basic statutory maximum for all persons convicted of a particular offense, but an enhanced statutory maximum for persons convicted of that offense who also had prior convictions. Such enhanced sentences are a critical component of sentencing for federal narcotics crimes.[1] The courts of

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[1] For example, 21 U.S.C. 841(b)(1)(C) states that persons convicted of specified controlled substance offenses "shall be

appeals that had addressed the question uniformly concluded that the "offense statutory maximum" for a defendant with prior convictions was the enhanced maximum penalty, not the maximum penalty authorized for a defendant with no prior convictions. See *United States* v. *Smith*, 984 F.2d 1084, 1086-1087 (10th Cir.), cert. denied, 510 U.S. 873 (1993); *United States* v. *Saunders*, 973 F.2d 1354, 1364 (7th Cir. 1992), cert. denied, 506 U.S. 1070 (1993); *United States* v. *Garrett*, 959 F.2d 1005, 1009-1011 (D.C. Cir. 1992); *United States* v. *Amis*, 926 F.2d 328, 330 (3d Cir. 1991); *United States* v. *Sanchez-Lopez*, 879 F.2d 541, 558-560 (9th Cir. 1989).

By Amendment 506, effective November 1, 1994, the Sentencing Commission amended the commentary to Guidelines § 4B1.1 to define the phrase "offense statutory maximum." The Commission defined that phrase to mean "the maximum term of imprisonment authorized for the offense of conviction * * *, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." United States Sentencing Comm'n, *Guidelines Manual*, App. C,

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sentenced to a term of imprisonment of not more than 20 years." Section 841(b)(1)(C) further provides, however, that, "[i]f any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years." The enhanced penalties may be imposed only if "before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." 21 U.S.C. 851(a)(1).

Amend. 506. The Commission asserted that by precluding use of the enhanced statutory maximums, Amendment 506 "avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." *Ibid.* It also stated that "the enhanced maximum sentences provided for recidivist drug offenders * * * did not exist" at the time that 28 U.S.C. 994(h) was enacted. *Guidelines Manual*, Amend. 506 (Nov. 1, 1995). Pursuant to its authority under 28 U.S.C. 994(u), the Commission made Amendment 506 retroactive, so that a sentencing court would have discretion to reduce a sentence imposed before the promulgation of the amendment. See Sentencing Guidelines § 1B1.10(c) (Nov. 1, 1995).[2]

2. On January 3 and 13, 1994, a confidential informant purchased methamphetamine from Jerry Lind. When police officers arrested Lind on January 14, 1994, he stated that respondent was his supplier. Later that day, police officers arrested respondent at his home. As he was arrested, respondent discarded a box containing 113.7 grams of methamphetamine divided into numerous small bags. In a subsequent search of the house, the officers found drug paraphernalia, packaging material, scales, and police scanners. Respondent's house is 210 feet from an elementary school. Gov't C.A. Br. 3.

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[2] The Department of Justice opposed the proposed amendment before the Commission, and, following its promulgation, determined that federal prosecutors should oppose the application of the amendment by sentencing courts on the ground that it is invalid as inconsistent with 28 U.S.C. 994(h).

3. Based on prior convictions for controlled substance offenses and violent felonies, respondent qualified as a "career offender" under Sentencing Guidelines § 4B1.1. Before respondent's sentencing, the government objected to the use of Amendment 506 in determining his offense level, arguing that the amendment was inconsistent with 28 U.S.C. 994(h) and was therefore invalid. At sentencing, the district court employed the definition of "offense statutory maximum" set forth in Amendment 506, and it denied without comment the government's objection to the computation of respondent's offense level. See App., *infra*, 21a-22a; Tr. 175. Applying Amendment 506, the court determined that respondent's offense level was 34, which the court reduced by three levels for acceptance of responsibility. App., *infra*, 21a. Respondent's Guidelines range on the methamphetamine conviction was therefore 188-235 months' imprisonment. The district court sentenced respondent to 188 months' imprisonment, to run concurrently with the terms imposed on his other convictions. *Id.* at 4a. If the court had used the enhanced statutory maximum in computing respondent's offense level, his Guidelines range would have been 262-327 months' imprisonment. Gov't C.A. Br. 16; see App., *infra*, 4a.

4. A divided panel of the court of appeals affirmed, rejecting the government's contention that Amendment 506 is invalid. App., *infra*, 1a-7a.[3] The court observed that "[v]irtually everything that could be said in analysis of this case has been said by Judge Selya writing for the majority and Judge Stahl

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[3] In a separate opinion, the court rejected respondent's challenges to his convictions and sentence. App., *infra*, 8a-15a.

dissenting in" *United States* v. *LaBonte*, 70 F.3d 1396 (1st Cir. 1995), cert. granted, 116 S. Ct. 2545 (1996) (No. 95-1726). App., *infra*, 4a. The court "f[ou]nd Judge Selya's analysis more persuasive," *ibid.*, and concluded that Amendment 506 "accurately carries out the intention of Congress." App., *infra*, 7a. The court therefore affirmed the district court's sentencing determination. *Ibid.* Judge Rymer dissented "for the reasons stated by Judge Stahl in his dissenting opinion in" *LaBonte*. App., *infra*, 7a.

5. On April 23, 1996, the United States filed a petition for a writ of certiorari seeking review of the First Circuit's decision in *LaBonte*. On May 16, 1996, the United States filed a timely petition for rehearing in the instant case. The rehearing petition asked the court of appeals to hold the instant case pending the disposition of the *LaBonte* certiorari petition. On June 24, 1996, this Court granted the government's petition for a writ of certiorari in *LaBonte*. 116 S. Ct. 2545 (No. 95-1726). On July 15, the court of appeals denied the government's rehearing petition in the instant case. App., *infra*, 23a.

REASONS FOR GRANTING THE PETITION

This case presents the same issue as *United States* v. *LaBonte*, cert. granted, 116 S. Ct. 2545 (1996) (No. 95-1726). Both cases address the question whether the Sentencing Commission's implementation of the Career Offender Guideline conflicts with the Commission's obligation under 28 U.S.C. 994(h) to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of" career offenders. In the instant case, the court of appeals agreed with the First Circuit in *LaBonte* that the Commission acted in

conformity with its statutory mandate by defining the phrase "offense statutory maximum" in Guidelines § 4B1.1 to mean the statutory maximum term for persons convicted of that offense who do not have prior convictions. Because the resolution of *LaBonte* will govern the disposition of this case, this petition should be held pending the Court's decision in *LaBonte*.[4]

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *LaBonte*, No. 95-1726, and disposed of as appropriate in light of that decision.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

OCTOBER 1996

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[4] We have provided counsel for respondent with a copy of the government's certiorari petition and brief on the merits in *LaBonte*.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-30172

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JERRY WAYNE DUNN, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF WASHINGTON

Decided April 9, 1996

Before: FLETCHER, NOONAN, and RYMER, Circuit Judges

NOONAN, Circuit Judge:

In an unpublished memorandum disposition we affirm Jerry Wayne Dunn's conviction of two counts of illegal firearm possession and the conviction following his plea of guilty to one count of possessing methamphetamine; we also affirm his sentence. In this opinion we address the cross-appeal of the government to the sentence. Commentary adopted by the United States Sentencing Commission is challenged

by the Department of Justice, which contends that it is contrary to the relevant statute. We find the government's argument unpersuasive and affirm the sentence.

PROCEEDINGS

At Dunn's sentencing hearing the government objected to using the Amended Application Note 2, U.S.S.G. § 4B1.1, a Note added by Amendment Number 506 adopted by the Sentencing Commission in November 1994 with retroactive effect. *See* U.S.S.G. § 1B1.10(c) (Nov.1994). The Note reads:

> "Offense Statutory Maximum," for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), (b)(1)(C), and (b)(1)(D)). For example, where the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the "Offense Statutory Maximum" for the purposes of this guideline is twenty years and not thirty years. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that authorizes the greatest

maximum term of imprisonment. U.S.S.G. § 4B1.1 note 2 (Nov.1994).

The government contended that the Note is in conflict with 28 U.S.C. § 994(h), which provides in part:

> (h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—
>
> (1) has been convicted of a felony that is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. § 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. §§ 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C.App. § 1901 et seq.);
>
> (2) has previously been convicted of two or more prior felonies, each of which is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. § 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. §§ 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C.App. § 1901 et seq.). 28 U.S.C. § 994(h).

The argument advanced by the government was that "the maximum term authorized" included the enhancements Dunn could receive for his particular crimes.

On April 19, 1995, the district court rejected the government's argument and sentenced Dunn to 120 months following his conviction of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1); to 60 months following his conviction of possessing a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k); and, as a career offender, to 188 months following his plea of guilty to distributing methamphetamine within 1,000 feet of a public school in violation of 21 U.S.C. § 860(a). The 188 months is to run concurrently with the other two sentences.

The government now appeals, contending that under § 994(h) Dunn's sentence as a career offender should be in a range from 262 to 327 months or at least seven years longer than the sentence actually imposed.

ANALYSIS

Virtually everything that could be said in analysis of this case has been said by Judge Selya writing for the majority and Judge Stahl dissenting in *United States v. LaBonte*, 70 F.3d 1396 (1st Cir. 1995). We find Judge Selya's analysis more persuasive and refer to the history of the statute and the comprehensive treatment therein as confirmatory of our conclusion.

A key term in 28 U.S.C. § 994 is "categories." Categories are identified by the statute in terms of age, types of conviction, and number of convictions. Nothing more specific is indicated. The government's contention that "the maximum term authorized" for

the specified categories includes the enhancements added to the particular offense of a particular defendant runs exactly counter to the broad classifications embraced by the statutory expression. An individual sentence is affected in a "labyrinthine way" by "a myriad of individualized adjustments." *LaBonte*, 70 F.3d at 1409. The maximum term authorized for categories is not the term an individual defendant might receive.

"Category" is a word used elsewhere in this statute, 28 U.S.C. § 994(i), and it is a term used by Congress in the basic sentencing statute, 18 U.S.C. § 3553(a)(4). The contention of the dissent in *LaBonte* that the reference in § 994 to categories of defendants was a "linguistic accident or an awkward locution," *id.* at 1416, is not plausible in the light of this standard congressional usage. The term "category" identifies a class. *Id.* at 1407.

Congress goes on in § 994(h) to say that it is the Commission that "shall assure" that the Guidelines specify a sentence "to a term of imprisonment at or near the maximum term authorized for categories of defendants." Plainly the words "at or near" create a range in which the Commission is free to act. If Congress intended all sentences to be at the maximum it could have said so. Congress specified that it was for the Commission to determine by the Guidelines whether the term of imprisonment should be at the maximum or near it and to do so in terms of categories of defendants, not in terms of enhancements for particular defendants.

In commentary added by the Commission in 1995 after it adopted Application Note 2 the Commission explained its reasoning:

Background: Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain "career" offenders receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. . . ." 28 U.S.C. § 991(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ("The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S.Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

The legislative history of this provision suggests that the phrase "maximum term authorized" should be construed as the maximum term authorized by

statute. *See* S.Rep. No. 225, 98th Cong., 1st Sess. 175 (1983); 128 Cong. Rec. 26, 511-12 (1982) (text of "Career Criminals" amendment by Senator Kennedy); *id.* at 26,515 (brief summary of amendment); *id.* at 26,517-18 (statement of Senator Kennedy). U.S.S.G. § 4B1.1 comment (Nov.1995).

Application Note 2, added to § 4B1.1 of the Guidelines, accurately carries out the intention of Congress. It is not for the Department of Justice nor for this court to deny the Commission's carrying out of its statutory function in this way. *See Stinson v. United States*, 508 U.S. 36, 44-46, 113 S.Ct. 1913, 1919, 123 L.Ed.2d 598 (1993).

AFFIRMED.

RYMER, Circuit Judge, dissenting:

I would reverse for the reasons stated by Judge Stahl in his dissenting opinion in *United States v. LaBonte*, 70 F.3d 1396, 1414-20 (1st Cir. 1995) (Stahl, J., dissenting in part).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 95-30125, 95-30126
DC Nos. CR-94-027-FVS, CR-94-061-FVS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JERRY WAYNE DUNN, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF WASHINGTON

Decided April 9, 1996

Before: FLETCHER, JOHN T. NOONAN, JR., and RYMER, Circuit Judges

MEMORANDUM*

Jerry Wayne Dunn appeals his jury conviction of two counts of illegal firearms possession, his plea of guilty to one count of possessing methamphetamine, and his sentence. The government appeals his sen-

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

tence as well, raising a challenge to a recent amendment to commentary to U.S.S.G. § 4B1.1. While we discuss the government's appeal in a published opinion, we affirm Dunn's convictions and sentence in this memorandum.

FACTS AND PROCEEDINGS

On August 13, 1993, Dunn was arrested after police officers searched his vehicle with his consent and found one firearm in the trunk and another on the floor of the front seat. The police were investigating a gun fight that took place between two drivers in automobiles that morning. On January 27, 1994, Dunn was indicted on two counts: (1) felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), and (2) possession of a firearm with obliterated serial number in violation of 18 U.S.C. § 922(k). Dunn pleaded not guilty at his arraignment on January 31, 1994.

For unrelated conduct in which he allegedly engaged on January 14, 1994, Dunn was indicted on March 8, 1994, on five counts: (1) possession with intent to distribute more than 10 grams of methamphetamine in violation of 18 U.S.C. § 841(a)(1); (2) possession with intent to distribute marijuana in violation of 21 U.S.C. § 941; (3) possession with intent to distribute methamphetamine within 1000 feet of a public school in violation of 21 U.S.C. § 960(a); (4) possession with intent to distribute marijuana within 1000 feet of a public school in violation of 21 U.S.C. § 960(a); and (5) felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

For the counts in the January 27, 1994 indictment [the "firearms case"], Dunn stood trial on May 9, 1994. At trial George Marcel Kelly testified about his August 13, 1994 shootout with Dunn and admitted

that he (Kelly) pleaded guilty on November 11, 1993 to second degree assault for conduct stemming from the incident. Kelly also testified that he approached Dunn and told him that he would "whoop his ass when he was physically able" on the morning of the shootout; apparently, Kelly believed that Dunn was having an affair with his wife. Dunn's defense was twofold: first, that he was not in actual or constructive possession of the firearm found in the trunk of his car because he did not know it was there; and second, that he was not in possession of the firearm in the front seat of his car until he was justified in using it. Dunn argued in his justification defense that he did not know who placed the firearm near the front seat of the car and that at the time he possessed and used it during the shootout, he was justified in using a firearm. On May 17, 1994, the jury returned guilty verdicts on both counts; however, on count 1, the jury reached a guilty verdict only with respect to Dunn's possession of the firearm found in the passenger compartment, but not with respect to the gun found in the trunk of the car. The court dismissed that part of count 1.

Before Dunn was sentenced for this conviction, he entered a plea of guilty relating to the conduct alleged in the March 8, 1994 indictment [the "methamphetamine case"]. Under the plea agreement, Dunn pleaded guilty to count 3, possession with intent to distribute methamphetamine within 1000 feet of a public school in violation of 21 U.S.C. § 960(a), while counts 1, 2, 4, and 5 were to be dismissed. As to Dunn's sentence, the plea agreement stipulated that his base offense level was 28, with a 3 point reduction for timely acceptance of responsibility.

On February 7, 1995, Dunn moved for leave of the court to file a motion for a new trial based on newly discovered evidence in the firearms case and a motion to withdraw his guiity plea in the methamphetamine case. Dunn's motion for a new trial was based on the discovery of a new witness, James Suggs, who was not called at trial, but who stated in a declaration attached to Dunn's motion that he [Suggs] observed "Phil Hedge put a gun in Jerry Dunn's vehicle" shortly before the shooting incident and that "Jerry Dunn did not see Phil Hedge put the gun in his vehicle, as his back was turned, and he and Lawton Miller were engaged in a conversation." In another declaration attached to his motion, Dunn averred that Suggs first contacted him in December 1994 at the Spokane County Jail.

Dunn's motion to withdraw his guilty plea in the methamphetamine case was based on a claim of ineffective assistance of counsel and a claim that at the time of the plea he had not been informed that the government intended to seek a sentencing enhancement for career offenders. In his motion Dunn stated that his counsel misinformed him that the government was not seeking such an enhancement.

On April 3, 1995, the district court denied both of Dunn's motions. On the motion for a new trial, the court ruled that the proffered testimony of Suggs was cumulative to trial testimony by investigator Bill Proctor, who stated that Phil Edge told him that he, Edge, threw the firearm into Dunn's car and said something to the effect, "You may need this." (Edge himself would have invoked the Fifth Amendment.) The court also ruled that Dunn had not shown that the proffered testimony would "probably" result in acquittal, the showing needed for a new trial.

On the motion to withdraw the guilty plea, the court ruled that Dunn did not present any "fair and just reason" warranting such a motion, finding in part that Dunn had been advised by the court of the maximum sentence by law at his plea hearing.

Dunn's sentencing for the firearms and the methamphetamine convictions was consolidated. Dunn objected to the calculation of his base offense level in the Presentence Report and moved for downward departure. On April 19, 1995, the court sentenced Dunn to 120 months for his conviction of felon in possession of a firearm, 60 months for his conviction of possession of a firearm with obliterated serial number, and 188 months for his conviction of possession of methamphetamine with intent to distribute. The court determined that Dunn had two prior convictions—one involving a controlled substance, the other involving a crime of violence—that warranted sentencing Dunn as a career offender. The terms are to be served concurrently.

Dunn appealed his convictions and sentence on April 26, 1995, while on May 19, 1995 the government cross-appealed Dunn's sentence pursuant to 18 U.S.C. § 3742(b).

ANALYSIS

We conclude that the district court did not abuse its discretion in denying Dunn's motion for a new trial in the firearms case. *United States v. Kulczyk*, 931 F.2d 542, 548 (9th Cir. 1991). Dunn did not offer newly discovered evidence that would probably result in acquittal. *United States v. Steel*, 759 F.2d 706, 713 (9th Cir. 1985). To establish justification as a defense, Dunn was required to prove that "he did not recklessly place himself in a situation where he would be

forced to engage in criminal conduct" and that "he had no reasonable legal alternative." *United States v. Lemon*, 824 F.2d 763, 765 (9th Cir. 1987). Dunn could not establish either requirement with Suggs's proffered testimony. Even assuming that Dunn did not instigate the shootout with Kelly, Dunn could have attempted to drive away from Kelly's gunfire instead of returning fire. Instead, Dunn fired back at Kelly and then drove after him carrying his gun with him. Suggs's testimony could not have possibly justified Dunn's action in carrying the gun in this pursuit.

The district court did not abuse its discretion in denying Dunn's motion to withdraw his guilty plea before his sentencing in the methamphetamine case. *United States v. Alber*, 56 F.3d 1106, 1111 (9th Cir. 1995). The district court conducted a Rule 11 hearing to determine the voluntariness of Dunn's plea. Dunn's responses indicate that he understood that he could receive a maximum sentence of life in prison if he pleaded guilty and that the court was to decide his sentence. Erroneous advice by Dunn's counsel about his susceptibility to the career offender sentencing enhancement does not present any "fair and just reason to withdraw" his plea. *United States v. Oliveros-Orosco*, 942 F.2d 644, 646 (9th Cir. 1991).

Although a claim of ineffective assistance of counsel is generally considered on a habeas petition rather than on direct appeal, we find the record sufficiently complete to decide the issue in both of Dunn's cases. *See United States v. Molina*, 934 F.2d 1440, 1446 (9th Cir. 1991). Assuming for the sake of argument that defense counsel's failure to find Suggs as a prospective witness fell below the level of competent professional assistance, any error in not finding Suggs does not raise "a reasonable probability that, but for coun-

sel's unprofessional errors, the result would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Suggs's testimony would not have aided Dunn's defense. Nor was any incompetence shown by counsel's failure to object to the court's jury instruction on justification; the instruction correctly placed the burden of persuasion on the defendant. *Lemon*, 824 F.2d at 764.

We also reject Dunn's ineffective assistance of counsel claim in the methamphetamine case. Standing alone, a mistaken prediction about sentencing does not constitute ineffective assistance of counsel. *United States v. Turner*, 881 F.2d 684, 687 (9th Cir.), *cert. denied*, 493 U.S. 871 (1989). Dunn attempts to characterize the misinformation he received from his counsel about the government's intention to seek a career offender enhancement as a mistake about the law and not simply a prediction. The argument is without force. Dunn's counsel allegedly told him that the government would not seek a sentencing enhancement for a career offender; before sentencing, this advice was a prediction of what the government would do. *See Oliveros-Orosco*, 942 F.2d at 646. Moreover, assuming counsel's performance fell below the professional standard, no prejudice occurred because Dunn acknowledged in open court at his plea hearing that he was subject to a possibility of a life sentence. *See United States v. Thornton*, 23 F.3d 1532, 1533-34 (9th Cir. 1994) (per curiam).

Finally, we reject Dunn's challenges to his sentence. First, Dunn was properly sentenced to a career offender enhancement to his methamphetamine conviction based on his two previous convictions, one for the firearms convictions and one for a February 18, 1987 conviction for manufacturing a controlled

substance. Although Dunn's sentencing for his firearms convictions was consolidated with his sentencing for his methamphetamine conviction, an arrest separated the underlying offenses, making the two offenses unrelated for sentencing purposes. *United States v. Gallegos-Gonzalez*, 3 F.3d 325, 328 (9th Cir. 1993). Second, the district court was "aware that it could depart downward," but "[h]aving considered all of the circumstances of this case" it "decline[d] to do so." The district court's refusal to depart is therefore unreviewable. *United States v. Brown*, 985 F.2d 478, 480 (9th Cir. 1993).

Accordingly, we AFFIRM.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CR-94-027-FVS
No. CR-94-061-FVS

UNITED STATES OF AMERICA, PLAINTIFF

v.

JERRY WAYNE DUNN, DEFENDANT

[APRIL 19, 1995]

ORDER RE DEFENDANT'S SENTENCING OBJECTIONS

THE DEFENDANT came before the Court on March 10, 1995, for sentencing. He was represented by Leslie R. Weatherhead and Donald A. Kellman. The government was represented by Assistant United States Attorney Thomas O. Rice. This order is intended to memorialize the Court's oral rulings regarding the defendant's objections. Fed.R.Crim.P. 32(c)(3)(D).

BACKGROUND

The defendant is being sentenced in two separate causes. In CR-94-027-FVS, the charges are felon in

possession, 18 U.S.C. § 922(g)(1), and possession of a firearm with an obliterated serial number. 18 U.S.C. § 922(k). In CR-94-061-FVS, the charge is possession of methamphetamine with intent to distribute within one thousand feet of a public school. 21 U.S.C. § 841(a)(1); 21 U.S.C. § 860(a).

PRIOR FELONY CONVICTIONS

A. *Texas Convictions*

The defendant has been arrested on a number of occasions. Two are particularly important here. On February 18, 1987, he was arrested in Grayson County, Texas, on a charge of manufacturing amphetamine. On April 6, 1988, he was arrested in the same county on a charge of possessing a sawed-off shotgun.

As it turned out, neither crime was adjudicated until June 5, 1989. On that date, the defendant entered pleas of guilty to both Second Degree Manufacture of a Controlled Substance, and Unlawful Possession of Prohibited Weapons. Based upon his pleas of guilty he was sent to prison.

B. *Classification*

To calculate the defendant's base offense level in CR-94-027-FVS, the Court must decide whether the two convictions listed above are "prior felony convictions" which are either "crime[s] of violence" or "controlled substance offense[s]." USSG § 2K2.1(a)(2) (Nov. 1994). In CR-94-061-FVS, the Court must conduct the same inquiry. To determine whether the defendant should be sentenced as a career offender in CR-94-061-FVS, one of the things which the Court must decide is whether the two convictions are "prior felony convictions" which are either "crime[s] of violence" or "controlled substance offense[s]." USSG §

4B1.1. Thus, the following analysis applies with equal force in both instances.

It is clear that both § 2K2.1(a) and § 4B1.1 rely upon § 4B1.2 for a definition of the terms "crime of violence" and "controlled substance offense." USSG § 2K2.1, comment. (n.5)[1] ; USSG 4B1.1, comment. (n.1).[2] The Court has examined both convictions in light of that section. Having done so, the Court is satisfied that the crime of Second Degree Manufacture of a Controlled Substance is a "controlled substance offense," USSG § 4B1.2(2), and that the crime of Unlawful Possession of Prohibited Weapons is a "crime of violence." USSG § 4B1.2(1)(ii).[3]

The next question is more complicated. Since the defendant entered pleas of guilty and was sentenced on both charges at the same hearing, should the two convictions be counted as separate convictions?

When it comes to counting prior convictions, both sections 2K2.1 and 4B1.2(3) rely upon 4A1.1. USSG § 2K2.1, comment. (n.5)[4]; USSG 4B1.2(3).[5] That section

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[1] Application Note 5 to § 2K2.1 states, in part, that the terms "'[c]rime of violence,' 'controlled substances offense,' and 'prior felony conviction(s),' are defined in § 4B1.2."

[2] Application Note 1 to § 4B1.1 states, "'Crime of violence,' 'controlled substances offense,' and 'two prior felony convictions,' are defined in § 4B1.2."

[3] *See United States v. Hayes*, 7 F.3d 144, 145 (9th Cir. 1993) (possession of a sawed-off shotgun "involves the substantial risk of improper physical force"), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1403, 128 L.Ed.2d 76 (1994).

[4] Application Note 5 to § 2K2.1 states, in part, that "For purposes of determining the number of such convictions . . ., count any such prior conviction that receives any points under § 4A1.1."

established the criteria for determining which prior convictions are counted when calculating the criminal history category.

Section 4A1.1 is not to be read in isolation, however. It must be interpreted in light of the definitions and instructions contained in § 4A1.2.[6]

Section 4A1.2(a)(2) provides, in part, that "[p]rior sentences imposed in unrelated case are to be counted separately." Application Note 3 explains that "[p]rior sentences are not considered related if they were for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense)." USSG § 4A1.2, comment. (n.3).

The provisions of Application Note 3 which are quoted above became effective November, 1991. The parties agree that the rule set forth in Application Note 3 applies only if the offense for which the defendant is being sentenced (*i.e.*, the "instant offense") occurred after November, 1991. *United States v. Bishop*, 1 F.3d 910, 912 (9th Cir. 1993). The defendant, however, would take that construction of Application Note 3 one step further. He would have the Court rule that both the instant offense and the predicate offenses must have occurred after November, 1991.

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[5] Section 4B1.2(3) provides that questions regarding whether prior convictions should be counted separately are to be determined "under the provisions of § 4A1.1(a), (b), or (c)."

[6] USSG § 4A1.1 comment. ("The definitions and instructions in § 4A1.2 govern the computation of the criminal history points. Therefore, §§ 4A1.1 and 4A1.2 must be read together.")

As authority, he cites *United States v. Lindholm*, 24 F.3d 1078 (9th Cir. 1994). In that case, Mr. Lindholm was charged with three counts of bankruptcy fraud. All three counts occurred prior to November, 1991. *Id.* at 1082.

When it came time for Lindholm to be sentenced on the federal charges, the district court noted that he had a number of prior state convictions. However, three of his prior convictions had been consolidated for sentencing. *Id.* at 1087. Apparently relying on the 1991 amendment to Application Note 3, the district court treated these three prior convictions as separate offenses.

On appeal, the question was whether it was appropriate for the district court to do so. The circuit court held that it was not. Since the three counts of bankruptcy fraud for which the defendant was being sentenced in federal court had occurred prior to the effective date of the amendment, *Bishop* controlled. The 1991 amendment could not be applied retroactively. As a result, the three prior convictions had to be treated as related cases.

In this case, by contrast, the instant offense occurred after 1991. Thus, the 1991 amendments to § 4A1.2 govern. *See United States v. Gallegos-Gonzalez*, 3 F.3d 325, 326 n.1 (9th Cir. 1993).

Since the defendant's convictions for Second Degree Manufacture of a Controlled Substance and Unlawful Possession of Prohibited Weapons are separated by an intervening arrest, they arise from unrelated cases. Consequently, they must be treated as separate convictions—one for a "controlled substance offense," the other for a "crime of violence."

CR-94-027-FVS

A. *USSG § 2K2.1(b)(5)*

The defendant objects to a four-level increase under § 2K2.1(b)(5). He argues that he was the victim of an assault by George Kelly, and that he used the firearm only to defend himself.

The Court disagrees. The defendant's use of the firearm cannot be justified as an act of self defense. To the contrary, his conduct was no less assaultive than Kelly's.

B. *USSG § 3E1.1*

The defendant requests a two-level decrease for acceptance of responsibility. Although he went to trial, he insists he never contested possession of the weapons. Rather, he argued that possession was legally justified.

The Court declines to grant the decrease the defendant seeks. Although putting the government to its burden of proof doesn't necessarily preclude a reduction for acceptance of responsibility,[7] such a reduction is not warranted here.

CR-94-061-FVS

The defendant qualifies as a career offender. USSG § 4B1.1. Under the 1994 amendments, the fact that the defendant has more than one controlled substance violation is disregarded. USSG 4B1.1 comment. (n.2). Thus, he is deemed to be facing a maximum term of imprisonment of 40 years. 21 U.S.C. § 841(b)(1)(B). That results in an offense level of 34, which is reduced by three levels for acceptance of responsibility. USSG § 3E1.1.

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[7] USSG § 3E1.1 comment. (n.2).

DOWNWARD DEPARTURE

The Court is aware that it could depart downward. Having considered all of the circumstances of this case, however, the Court declines to do so.

18 U.S.C. § 3553(c)

The defendant has been sentenced to terms of imprisonment which are consistent [with] the seriousness of his conduct. In imposing those sentences, the Court has considered the entire record before it.

IT IS HEREBY ORDERED:

1. The Court adopts the statements of fact set forth in the Presentence Investigation Report.

2. The defendant's objections to the Court's computation of his sentence are denied.

3. The government's objection to the Court's computation of the defendant's career offender offense level is denied.

4. The defendant's motion for downward departure is denied.

5. All other pending motions are denied as moot.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

DATED this *19* day of April 1995.

/s/ FRED VAN SICKLE
FRED VAN SICKLE
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-30172
DC No. CR-94-061-FVS

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT

v.

JERRY WAYNE DUNN, DEFENDANT-APPELLEE

[Filed: July 11, 1996]

Before: FLETCHER, NOONAN, and RYMER, Circuit Judges

A majority of the panel as constituted in the above case has voted to deny the petition for rehearing. Judges Fletcher and Noonan have voted to deny the petition. Judge Rymer has voted to grant the petition.

The petition for rehearing is DENIED.

APPENDIX E

STATUTORY PROVISIONS AND SENTENCING GUIDELINES

1. Section 994(h) of Title 28 of the United States Code provides as follows:

The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*).

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959, and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*).

2. Section 4B1.1 (including accompanying Commentary) of the United States Sentencing Guidelines (Nov. 1, 1994) provide as follows:

§ 4B1.1. CAREER OFFENDER

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum	Offense Level*
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12

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* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

Commentary

Application Notes:

1. "Crime of violence," "controlled substance offense," and "two prior felony convictions" are defined in § 4B1.2.

2. "Offense Statutory Maximum," for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. 841(b)(1)(A), (b)(1)(B), (b)(1)(C), and (b)(1)(D)). For example, where the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the "Offense Statutory Maximum" for the purposes of this guideline is twenty years and not thirty years. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that authorizes the greatest maximum term of imprisonment.

Background: Section 994(h) of title 28, United States Code, mandates that the Commission assure that certain "career" offenders receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28

U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(a) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ." 28 U.S.C. §991(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to Commission rather than a mandatory minimum sentencing statute ("The [Senate Judiciary] the Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

The legislative history of this provision suggests that the phrase "maximum term authorized" should be construed as the maximum term authorized by statute. See S. Rep. 98-225, 98th Cong., 1st Sess. 175 (1983), 128 Cong. Rec. 26, 511-12 (1982) (text: of "Career Criminals" amendment by Senator Kennedy), 26, 515 (brief summary of amendment), 26, 517-18 (statement of Senator Kennedy).